Supreme Court, U.S.
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No. 1
06-31

In The
Supreme Court of the United States

NEAL F. GASSER,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

On March 31, 2006 the U.S. Court of Appeals for the District of Columbia reversed a jury verdict in favor of petitioner and the district court's denial of a renewed motion for summary judgment, and held that while plaintiff may have shown that his employer perceived him as being significantly restricted in two classes of jobs (law enforcement and driving jobs), ~~petitioner~~ was further required to present statistical evidence as to the number of law enforcement and driving jobs in the local geographic area.

Therefore, the issue presented to this court is: Whether under the Americans with Disabilities Act, petitioner was ~~required~~ to present statistical evidence above and beyond his showing that he was perceived by his employer as being significantly restricted in two well-recognized classes of jobs (law enforcement and driving) to demonstrate that he was perceived as "disabled"?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellee below) is Neal F. Gasser. Respondent (defendant-appellant below) is the District of Columbia.

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PETITION FOR A WRIT OF CERTIORARI

Neal F. Gasser respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1-18) is reported at 442 F.3d 758. The opinion of the district court denying respondent's renewed motion for judgment as a matter of law is unreported and is reproduced at App . 19-26.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2006. The jurisdiction of the court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition are pertinent provisions of the Americans with Disabilities Act, the EEOC regulations and the EEOC interpretive guidance at issue here.

STATEMENT

A. Introduction.

In this Americans with Disabilities Act ("ADA"), 29 U.S.C. § 12101 et seq., case originally filed March 13, 2000, the plaintiff alleged that his employer, the D.C. Metropolitan Police Department, discriminated against him by placing him in limited duty status, including even prohibiting him from riding in a police car, because defendant believed plaintiff's use of the drug Coumadin (a blood-thinner) made him medically unable to perform any job duties involving risk that he could be subject to trauma. App. 19-21. The defendant's actions deprived plaintiff of most overtime and all promotional opportunity. App. 20. The defendant also sought to involuntarily retire the plaintiff from the police department because it determined that his Coumadin usage made him medically unable to perform any police officer position within the entire department. App. 20-21. The defendant based its determination on its conclusion that the risk of trauma could never be entirely eliminated in any police officer position including even the Chief of Police. Id.

The case was then tried before a jury in October 2001; however, the jury failed to reach a verdict, and the court declared a mistrial. App. 21. A second trial was held on July 21-24, 2003. On July 24, 2003, the jury reached a verdict and made the following specific factual findings: (1) "Plaintiff has proven by a preponderance of the evidence that he was regarded by Defendant as having a disability,

namely, the use of Coumadin, a blood-thinning medication, that substantially limits him in the major life activity of working"; (2) "Plaintiff has proven by a preponderance of the evidence that he could have performed the essential functions of his job as a supervisory sergeant"; (3) "Defendant intentionally discriminated against [plaintiff] based on the fact that it regarded Plaintiff as having a disability, namely, the use of Coumadin, a blood-thinning medication"; and (4) that defendant had not "proven by a preponderance of the evidence that Plaintiff poses a direct threat to the health or safety of himself or others." The jury also awarded $34,096 in compensatory damages. Id.

In an unpublished memorandum opinion dated November 10, 2003, the district court denied defendant's renewed motion for judgment as a matter of law. App. 19. The court went on to find that there was sufficient evidence for a reasonable jury to find that plaintiff was perceived as being disabled in the major life activity of "working". App. 24. The court found that there was sufficient evidence to show that he would be precluded from at least two well-recognized classes of jobs--law enforcement and driving jobs--given the restrictions placed upon him by the police department, and further noted that the defendant presented no counter expert from whom "the jury could draw opposing conclusions." App. 24-25.

An appeal to the U.S. Court of Appeals for the District of Columbia Circuit followed. App. 1.

B. The Conflict in the Standard of Proof between the DC Circuit and all other Sister Circuits to Consider the Issue.

The ADA makes it unlawful for an employer to discriminate against "a qualified individual with a disability" because of the individual's disability. 42 U.S.C. § 12112(a). A disability is defined in the ADA as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," or as "being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A) & (C) [App. 27-28]. Thus, an individual has a disability under the ADA where an employer mistakenly believes he has a physical impairment that substantially limits a major life activity. Sutton v. United Air Lines, 527 U.S. 471, 490 (1999).

In this case Plaintiff alleged that defendant regarded plaintiff as being "substantially limited" in the major life activity of "working". In order to show that defendant regarded plaintiff as substantially limited in working a plaintiff must show that defendant regarded plaintiff as being "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i)(emphasis added)[App. 35]. "Substantially limited" does not mean completely precluded from. Bragdon v. Abbott, 524 U.S. 624, 1118 S. Ct. 2196, 2206, 141 L. Ed. 2d 540 (1998)("The Act addresses substantial limitations on major life activities, not utter inabilities")(emphasis supplied).

In evaluating how the employer "regarded" an individual, a court must look at both the employer's subjective beliefs and its objective actions. See EEOC Compl. Man. §§ 902.8, & 6888 at 5326 (in determining whether an individual is regarded as having a disability, "one must examine the employer's perception and treatment of the charging party"). Thus, both what the employer believed about the individual, and its actions toward him, inform the ultimate determination of whether it regarded him as substantially limited. Id.

One way in which a plaintiff may show that he is regarded as disabled in working is by demonstrating that his employer regarded him as being substantially limited in a class of jobs. See 29 C.F.R. § 1630.2(j)(3)(I)[App. 35]. " Various circuits have held that the general area of "law enforcement" and/or"peace officer" is a well-recognized class of jobs. See McKenzie v. Dovala, 242 F.3d 967 (10th Cir. 2001); Tullos v. City of Nassau Bay, 137 Fed. Appx. 638 (5th Cir. 2005); Williams v. Philadelphia Housing Auth Police Dept., 380 F.3d 751, 764-65 (3rd Cir. 2004).

In McKenzie, for example, the plaintiff was a sheriff's deputy who suffered from post-traumatic stress disorder as a result of childhood sexual abuse. Id. at 968. As a result of her illness she was forced to quit the department when she exhausted all her leave. Id. After treatment, however, she was cleared by her treating physician to return to full duty, and she reapplied for a position within the department. However, the defendant refused to rehire her and sought to have her decertified as a

peace officer because defendant "didn't feel she should be in law enforcement any longer." Id. 968, 970. The district court granted summary judgment, holding that while defendant "may have considered plaintiff substantially limited in her ability to work as a deputy sheriff...McKenzie failed to establish that she was regarded as unable to perform a class of jobs or a broad range of jobs in various classes." Id. at 971. The Court of Appeals reversed, holding that: "By refusing to consider [plaintiff] for a job in her former workplace despite ten years of successful service, the [defendant] treated her as significantly restricted as compared to the average person having comparable training, skills and abilities." Id. at 972. The court also noted that defendant believed plaintiff not capable of being a "peace officer" generally, and ultimately found that the relevant class that defendant regarded plaintiff as restricted from was law enforcement. Id.

The Seventh Circuit has also held that driving jobs are a class of jobs. Best v. Shell Oil, 107 F.3d 544 (7th Cir. 1997). In Best plaintiff suffered a knee injury and was unable to continue driving a Peterbilt truck. Id. at 545. There was disputed evidence as to whether plaintiff could drive other types of trucks. Id. at 548. Nevertheless, the Court of Appeals reversed the district court's grant of summary judgment and found a material issue of fact as to whether plaintiff's ability to perform truck driving jobs was substantially impaired. Id. The instant case is even more compelling because it involves a broader restriction on driving jobs than merely truck driving jobs. In the instant case defendant has

restricted plaintiff from even riding in a police car. App. 20.

In Gasser there was sufficient evidence to show that plaintiff would be precluded from many or most law enforcement positions and from all patrol officer or peace officer positions and from all driving jobs, which should have been sufficient under the regulations and would have been sufficient under sister circuit case law to show that plaintiff was precluded from a class (or classes) of jobs. App. 20. Yet, the D.C. Circuit held that even if Gasser showed that he was precluded from a well-recognized class of jobs, he needed to do more than the sister circuits holdings require and additionally put forth precise statistical evidence on the number of jobs encompassed by each class:

> Gasser argues that Duncan [v. WMATA, 240 F.3d 1110 (D.C. Cir. 2001)] 's evidentiary standard applies only to plaintiffs claiming preclusion from a broad range of jobs. Based on that premise, he urges us to uphold the judgment below despite the flaws in Dr. Thomas's analysis because the District regarded Gasser as unable to perform two classes of jobs: driving jobs and law enforcement jobs. The premise is mistaken. The class-of-jobs limitations he alleges must be "substantial" under the Disabilities Act. 42 U.S.C. § 12102(2)(A), (C). Duncan's evidentiary standard applies to all claims of "substantial limitation," whether from a broad range or a substantial class of jobs. 240 F.3d

> at 1115-16. Gasser therefore failed to satisfy his evidentiary burden.

Gasser at 765 [App. 16].

In Duncan the D.C. Circuit held that "the ADA requires a plaintiff in Duncan's position to produce some evidence of the number and types of jobs in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs..." 240 F.3d 1115-1116. The court thus turned precatory language in the EEOC ADA regulations into a mandatory one. 29 C.F.R. pt. 1630.2(j)(3)(ii)(A-C)[App. 35-36]("In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of `working.'")(emphasis added). In doing so, the court turned a not "onerous" evidentiary burden into one that is quite onerous, contradicting the regulation. 29 C.F.R. pt. 1630, App. § 1630.2(j)(1)[App. 48].

All other circuit courts to rule on this issue have not required plaintiff to present such statistical evidence (or any other evidence) beyond the showing that the plaintiff was perceived as be disabled from a well-recognized class of jobs such as law enforcement.

Thus, under McKenzie, the Tenth Circuit held:

> By refusing to consider her for a job in her former workplace despite ten years of successful service, the Sheriff treated her as

> significantly restricted "as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). As Dovala and Benton acknowledged in their respective depositions, it is undisputed that someone with McKenzie's training, skills, and abilities, but without a psychological disability, could have been hired as a patrol officer. Viewing the factual record in the light most favorable to the plaintiff, we see a genuine issue for trial as to whether the Sheriff regarded McKenzie as disabled under the ADA.

McKenzie at 972.

In Tullos, the Fifth Circuit held:

> There is also evidence that Wrobleski considered Tullos's impairment as significantly restricting him from work in the overall field of law enforcement. Wrobleski referred in one of his letters to Tullos's "fitness and suitability to return to work in the field of law enforcement." When asked at trial whether Tullos could have performed a police dispatcher position, Wrobleski stated that he "would have been very leery of placing him in that position." Nowhere in Wrobleski's letters or testimony does he describe Tullos's impairment in terms that limit it to police officer work. The jury could have reasonably found that Wrobleski perceived Tullos's impairment as significantly restricting him from employment in the field of law

> enforcement, which has been found by other courts to constitute a class of jobs under the regulations implementing the ADA.

Tullos at 649.

In Williams the Third Circuit held:

> Williams contends that his inability to carry a firearm precludes him from serving in most law enforcement jobs wherever located and therefore significantly restricts his ability to perform that class of jobs. While the record has not been fully developed on this issue, it does support that contention. PHA administrator John O'Brien testified in an affidavit that "[a]s of 1998, the only job assignment available in the PHA police department that did not require the use of a firearm was work in the PHA radio room." ... PHA does not explain why law enforcement positions are not a "class of jobs" within the meaning of that phrase as used in the EEOC's regulations, and our reading of those regulations persuades us that the record would support a finding in favor of Williams on this issue. For example, assuming the jury were convinced that Williams's condition substantially restricts his ability to perform law enforcement jobs, it seems to us that Williams would be no less limited in the major life activity of working than the computer programmer referenced by the EEOC as being "substantially limited in working, because her impairment prevents her from working in the

> class of jobs requiring use of a computer." Technical Assistance Manual at II-7.

Williams at 764.

Thus, there is a conflict in the circuits as to the proof required of a plaintiff to show that he was substantially limited in a class of jobs.

REASONS FOR GRANTING THE PETITION

The petition should be granted since there is a conflict in the circuits. The Third, Fifth, Seventh and Tenth circuits do not require any such statistical evidence or any further showing when a plaintiff has demonstrated he is substantially limited from a well-recognized class of jobs. The D.C. Circuit requires statistical evidence beyond this showing.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

FOR THE PLAINTIFF

/s/

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued
December 8, 2005

Decided
March 31, 2006

No. 04-7018

NEAL F. GASSER,
APPELLEE/CROSS-APPELLANT

v.

DISTRICT OF COLUMBIA,
APPELLANT/CROSS-APPELLEE

Consolidated with
04-7024

Appeals from the United States District Court
for the District of Columbia
(No. 00cv00534)

{Entered March 31, 2006}

Donna M. Murasky, Senior Assistant Attorney General, Office of Attorney General for the District of Columbia, argued the cause for appellant/cross-appellee. With her on the briefs were *Robert J. Spagnoletti,* Attorney General, and *Edward E. Schwab,* Deputy Attorney General.

Gregg D. Adler argued the cause for appellee/cross-appellant. On the briefs was *Michael P. Deeds. James L. Kestell* entered an appearance.

Before: GINSBURG, *Chief Judge,* RANDOLPH, *Circuit Judge,* and EDWARDS, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge:* The District of Columbia appeals from the judgment entered after a verdict in favor of Neal F. Gasser, a sergeant in the D.C. Metropolitan Police Department, finding the District liable to him under the Americans with Disabilities Act of 1990 ("Disabilities Act"), 42 U.S.C. §§ 12101-12213. Gasser cross-appeals from the district court's order refusing to direct the Police Department to promote him to Lieutenant. Among the matters in controversy is the proper application of the evidentiary standard laid down in *Duncan* v. *Washington Metropolitan Area Transit Authority,* 240 F.3d 1110 (D.C. Cir. 2001) (en banc).

I.

Gasser's complaint alleged that the Police Department violated the Disabilities Act when it refused to return him to full duty. *See Gasser* v. *Ramsey,* 125 F. Supp. 2d 1, 1-2 (D.D.C. 2000). After a jury failed to reach a verdict, the case was set for retrial. The district court denied the District's motions for judgment as a matter of law after Gasser presented his case-in-chief and after the close of all the evidence. The jury returned a special verdict in

Gasser's favor and awarded him $34,096 for emotional distress.

The evidence, viewed most favorably to Gasser, *see Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000), showed as follows. Gasser joined the Police Department as a patrol officer in 1986 and was promoted to master patrol officer in 1991 and to sergeant in 1994.[1] Police Department policy requires that all officers be "street ready" or "fit for full duty" regardless of rank. This means that all officers -including the Chief of Police - must be able to perform patrol functions from time to time. Each officer is expected to be able to subdue a suspect within a matter of minutes, with or without assistance.

In July 1996, Gasser suffered a mesenteric vein thrombosis - a blood clot in his abdomen. Though Gasser twice previously had been treated for discrete clots in his legs, this time doctors diagnosed a protein S deficiency. Protein S deficiency is an inherited disorder that tends to cause blood to clot. Doctors treat protein S deficiency with anticoagulants - blood thinners - of which Coumadin is the most commonly prescribed. Gasser's

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[1] A patrol officer is a first-responder, handling the day-to-day activities on the street as calls come in on the radio. A master patrol officer has the same responsibilities, but also takes on supervisory responsibilities if a sergeant is not on the scene. A sergeant's responsibilities are more supervisory, with less involvement in day-to-day activities on the street. Gasser, for examples, made only three or four arrests each year as a sergeant.

hematologist, Dr. Harold S. Mirsky,[2] prescribed Coumadin in 1996 to treat Gasser's blood disorder, and Coumadin has been part of Gasser's regimen ever since.

Gasser went on limited duty for six months after he began taking Coumadin. Limited duty is a temporary status, intended to provide sick or injured officers an opportunity to recover completely while preparing to return to full duty. An officer cannot be promoted or earn overtime on limited duty. The District's Police and Fire Clinic provides care for, and makes decisions concerning the duty status of, sick or injured officers. Because limited duty is not a full-time status, once the doctors at the Clinic provide all the medical care they can, a patient still unable to fulfill the obligations of his rank is involuntarily retired- a process involving multiple levels of recommendation and review. At all times relevant to this case, Dr. Michelle Smith-Jeffries was the Clinic physician who decided when officers should be placed on limited duty.

By the end of 1996, Clinic physicians agreed to return Gasser to full-duty status upon receiving a

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[2] Dr. Mirsky is a board-certified hematologist with more than thirty-nine years of experience treating patients with blood disorders.

letter from Dr. Mirsky urging them to do so.[3] Clinic physicians knew Gasser continued to take Coumadin after returning to full duty. He performed at full duty without incident for a number of years. But when he sprained his wrist in an off-duty car accident in December 1998, he again reported to the Clinic.

At the Clinic, Gasser met Dr. Craig Thorne, a physician specializing in occupational medicine, who thought Gasser should be on limited duty because he was taking Coumadin. Dr. Mirsky wrote a letter to Dr. Smith-Jeffries, Dr. Thorne's supervisor, regarding Gasser's condition. In the letter, Dr. Mirsky stated that Gasser was "not at any excessive risk of bleeding" unless he experienced "significant trauma."[4] Because Dr. Mirsky understood Gasser's responsibilities to be supervisory, Dr. Mirsky saw no reason to "restrict [Gasser] from working as a full

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[3] Dr. Smith-Jeffries testified that the Clinic's documentation concerning Gasser's return to full duty is, at best, inconsistent. She stated that the "physician's note clearly states that no full duty while on coumadin, that he should be returned to limited duty." She further testified that a different physician noted on Gasser's chart that Gasser should be returned to full duty; although this was crossed out and "limited duty" circled, "the police officer who was on duty at that time" wrote "return to full duty" on the form.

[4] At trial, Dr. Mirsky explained that his assessment was based on Gasser's international normalized ratio ("INR"), which is a way to measure blood's ability to clot. Dr. Mirsky stated that when Gasser's INR tests between two and three he "is not at risk of excessive bleeding." He also testified that Gasser "regularly tested" at that level and that over time a patient's INR level stabilizes. At the time of trial, Gasser had been on Coumadin for six years without experiencing "any excessive bleeding."

duty sergeant." Although Dr. Thorne was inclined to leave Gasser on limited duty, he consulted Dr. Smith-Jeffries because "Gasser really wanted to work."

Dr. Smith-Jeffries agreed with Dr. Thorne's preliminary diagnosis and was not convinced by Dr. Mirsky's letter that Gasser should return to full duty. The letter "perplexed" Dr. Smith-Jeffries because Dr. Mirsky acknowledged that Gasser was at an excessive risk of bleeding if he experienced "significant trauma," but nevertheless urged his return to full duty. Dr. Mirsky believed Gasser could resume his responsibilities as a "full duty sergeant," based on what Gasser told him about his supervisory duties as a sergeant. The relevant question for Dr. Smith-Jeffries, however, was not whether Gasser could resume supervisory duties, but whether he was "fit for full duty," which includes patrol duty.

Ultimately, Drs. Thorne and Smith-Jeffries decided to refer Gasser to another hematologist, Dr. Joseph P. Catlett, for an "independent opinion." After examining Gasser in late June 1999, Dr. Catlett sent a letter to Dr. Smith-Jeffries in which he concluded that Gasser had an increased risk of "trauma-associated bleeding due to Coumadin use." However, rather than giving Dr. Smith-Jeffries an independent opinion of Gasser's fitness for full duty, Dr. Catlett "defer[red] to [her] expertise" and told her "the decision lies with [her] office." Dr.Smith-Jeffries was not satisfied with this deferential position and decided to have another physician render an independent judgment.

She contacted the occupational health clinic at Johns Hopkins and scheduled Gasser to see Dr. Virginia Weaver in August 1999. Dr. Weaver is a board-certified physician in internal and occupational medicine. After meeting with Gasser, Dr. Weaver concluded that he faced an "increased risk for bleeding" as a police officer taking Coumadin. She was concerned that he might suffer severe trauma and excessive bleeding when "engaging in high speed pursuits, participating in raids, [or] discharging firearms at persons." For these reasons, Dr. Weaver believed Gasser "would be a threat to coworkers and to the public [because] he could become incapacitated very quickly and then he would not be there to assist coworkers." Given Gasser's experience and desire to return to full duty, Dr. Weaver thought that it "would have been wonderful" if he could have maintained a job as a trainer or supervisor without any time on the street. But recognizing that this was not possible under the Police Department policy, she recommended that he not return to full duty.

Based on Dr. Weaver's report, Dr. Smith-Jeffries concluded that her original assessment was correct, that Gasser faced an "increased risk for harm, and that he should not work as a full duty police officer." The consequences to Gasser were severe. Beyond making Gasser ineligible for overtime pay and further promotion, the Police Department took Gasser's uniform, badge, and gun. It also confined him to desk duty and did not allow him to visit crime scenes. The Police Department also generally prohibited him from riding in a squad car for fear that a car in which he was riding might,

in an emergency, be diverted to a crime scene where he could suffer life-threatening physical trauma.

Although the Police Department never returned Gasser to full duty, it did return his uniform, badge, and gun in December 1999. Shortly thereafter, however, the Police Department initiated the process of involuntary retirement. Gasser brought this suit before that process could be completed.

At trial, Gasser presented to the jury the deposition testimony of Dr. Francis A. Thomas, a vocation rehabilitation specialist. Gasser used the testimony to establish the number of jobs the Police Department regarded him as unable to perform. Dr. Thomas began his analysis by determining the universe of jobs in the Washington-D.C. area for which Gasser was qualified absent any impairment. He found 206,000 such jobs. Dr. Thomas then removed from this group those jobs the Police Department regarded Gasser as unable to perform. Rather than removing jobs that involve a risk of physical trauma, however, Dr. Thomas presumed that Gasser would be able to perform only those jobs with responsibilities that resembled the desk duties he performed while on limited duty. He therefore removed from consideration all "heavy duty jobs" and "medium type jobs" and presumed that the Police Department regarded Gasser as able to perform only "light and sedentary type jobs." So restricted, Gasser could perform only 28.6% of the 206,000 jobs for which Dr. Thomas determined he was otherwise eligible. Dr. Thomas did not take into account the driving restriction the Police

Department placed on Gasser, nor did he specifically analyze the types of law enforcement jobs Gasser was able to perform.

After entry of judgment on the verdict, the District renewed its motion for judgment as a matter of law. The district court ruled that (1) even though Dr. Thomas erred in assuming that Gasser could perform only light and sedentary jobs, this error was offset by evidence that, in the District's view, Gasser could not perform jobs involving driving, and (2) that Gasser presented sufficient evidence for the jury to conclude he was not a direct threat to his own safety.

Gasser filed a post-trial motion to alter or amend the judgment to include his immediate reinstatement to full-duty status, lost overtime wages and prejudgment interest, attorney fees and costs, and promotion to Lieutenant. The court amended the judgment to include all the relief requested except for the promotion, finding insufficient evidence in the record to justify this.[5]

The District now appeals the district court's order denying judgment as a matter of law. Gasser cross-appeals, claiming the district court should have ordered the Police Department to promote him to Lieutenant.

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[5] The court awarded Gasser $64,179.71 in lost overtime wages and prejudgment interest, and $157,397.20 in attorney fees and costs.

II.

We review de novo the district court's denial of the District's motion for judgment as a matter of law. *See Curry* v. *District of Columbia,* 195 F.3d654, 658-59 (D.C. Cir. 1999). If the evidence supporting the verdict is "significantly probative," the verdict will stand "unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict." *Id.* at 659 (quoting *Smith* v. *Wash. Sheraton Corp.,* 135 F.3d 779, 782 (D.C. Cir. 1998)) (internal quotation marks omitted). Our duty is to "draw all reasonable inferences" in Gasser's favor without "mak[ing] credibility determinations or weigh[ing] the evidence." *Reeves* v. *Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150 (2000). We will therefore "disregard all evidence favorable to" the District "that the jury is not required to believe" and "give credence to the evidence favoring" Gasser. .at 151.

The District asks us to vacate the judgment below for either of two reasons: because Gasser presented insufficient evidence that his disability, if any, substantially limited his ability to work, *see Duncan v. Wash. Metro. Area Transit Auth.,* 240 F.3d 1110, 1114-16 (D.C. Cir. 2001) (en banc), or because the District adequately showed that he poses a direct threat to his own safety, which the Supreme Court has held is an affirmative defense to Disabilities Act liability, *see Chevron U.S.A. Inc. v. Echazabal,* 536 U.S. 73, 86-87 (2002). We reach only the District's first argument.

The Disabilities Act provides that a covered employer shall not "discriminate" against a disabled individual because of his disability. 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.4. A "disability" is not just a "physical or mental impairment," as common usage might suggest. 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g)(1). The Disabilities Act also prevents employers from taking adverse employment actions against those they "*regard[] as having*" a physical or mental impairment. 42 U.S.C. § 12102(2)(C) (emphasis added); 29 C.F.R. § 1630.2(g)(3).[6] The purpose of "regarded as" claims is to protect employees from "misperceptions [that] often 'resul[t] from stereotypic assumptions not truly indicative of ... individual ability.'" *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999) (quoting 42 U.S.C. § 12101(7)) (second and third alterations in original). An employer therefore may run afoul of the Disabilities Act "when it makes an employment decision based on a physical or mental impairment, [whether] real or imagined." *Id.* at 490.

In "regarded as" cases, not every adverse employment action gives rise to liability under the Disabilities Act. The "regarded as" disability must

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[6] The Supreme Court has recognized two ways an individual may be "regarded as" disabled. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999) (employer's mistaken belief either that employee has a disability or that employee's actual disability substantially limits major life activity); *see also Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521-22 (1999); *Haynes v. Williams*, 392 F.3d 478, 481 n.2 (D.C. Cir. 2004). The Equal Employment Opportunity Commission's regulations suggest a third. 29 C.F.R. § 1630.2(l)(2) (substantial limitation arising from others' attitudes about impairment).

"substantially limit[]" a "major life activit[y]." 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g)(1); *see Haynes* v. *Williams,* 392 F.3d 478, 481-82 (D.C. Cir. 2004).[7] The District argues that any limitations it regarded Gasser as having were not "substantial[]," *see Sutton,* 527 U.S. at 490-91, and that Gasser did not prove that they were, as he must, *see Haynes,* 392 F.3d at 482.

In *Sutton,* the Supreme Court, relying on Equal Employment Opportunity Commission regulations, held that a Disabilities Act plaintiff like Gasser must demonstrate that he is precluded from a "substantial class of jobs" or a "broad range of jobs,"[8] not just "one type of job, a specialized job, or a

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[7] What constitutes a "major life activity" is not at issue in this appeal, although the District raised the issue before the district court. Gasser claims that the District discriminated against him because of a perceived disability that would substantially limit his ability to work. Whether "working" is a "major life activit[y]" under the Disabilities Act, as the Equal Employment Opportunity Commission's regulations suggest, 29 C.F.R. § 1630.2(i), is a question we have not yet decided. Like the Supreme Court, *see Sutton,* 527 U.S. at 492, we have assumed *arguendo* that it is, *see Duncan,* 240 F.3d at 1114 n. 1, despite the "difficulties the issue presents," *id.* at 1117 (Randolph, J., concurring); *see Sutton,* 527 U.S. at 492. We do so again in this case.

[8] Gasser urges affirmance based on his preclusion from a substantial class or broad range of jobs. The District claims Gasser is limited to arguing only that he has been precluded from a broad range of jobs because he did not present the other theories to the jury. The usual rule is that a prevailing party may support the judgment on any ground raised or decided in the district court. *See, e.g., Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 38-39 (1989); *Mass. Mut. Life Ins. Co. v. Ludwig,* 426 U.S. 479, 481 (1976); *Nat'lFed'n of Fed. Employees v.*

particular job of choice." 527 U.S. at 492; *Duncan,* 240 F.3d at 1115; *see* 29 C.F.R. § 1630.2(j)(3)(i). "If jobs utilizing an individual's skills ... are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs." *Sutton,* 527 U.S. at 492.

It is not very precise to define a "substantial" limitation as preclusion from a "substantial" class or "broad" range of jobs. Whether a limitation precluding a plaintiff from 100 jobs is "substantial" depends, in part, on whether the plaintiff is otherwise qualified for 200 jobs or 200,000. In *Duncan* we explained that the relevant inquiry "depends primarily on the availability of jobs for which the impaired person qualifies," which must be an "individualized inquiry." 240 F.3dat 1114 (citation and internal quotation marks omitted). Our holding in *Duncan* was as follows:

> [T]he [Disabilities Act] requires a plaintiff... to produce some evidence of the number and types of jobs in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs; that is, the total number of such jobs that remain available to the plaintiff in such a class or range in the relevant market must be sufficiently low that he is effectively precluded from working in the class or range.

Greenberg, 983 F.2d 286,289 (D.C. Cir. 1993). The record sufficiently supports Gasser's having raised his contention regarding a substantial class of jobs.

Id. at 1115-16 (citing *Sutton,* 527 U.S. at 491-92). The plaintiff's evidence must be "significantly probative" so that the jury is not "left in the dark" about the vocational limitations the plaintiff faces. *Id.* at 1115.

Gasser concedes that the District's liability was premised on its view that he is "medically unable to perform jobs having duties or even possible duties with potential for trauma." Corrected Br. of Appellee/Cross-Appellant 22. But rather than looking to the reason Gasser was precluded from being a full-duty officer - potential for trauma - Dr. Thomas based his jobs analysis on the functions Gasser performed as a limited-duty officer. Dr. Thomas's analysis treated Gasser as precluded from "heavy duty jobs" and "medium type jobs" because, in Dr. Thomas's words, "[Gasser's] job now is to fill out forms on injured police officers." Dr. Thomas assumed Gasser was "restricted from a vast number of ... jobs that require hard, outside kind of work, given the limitations that are placed on him."

This was error, as the district court recognized. Under *Duncan,* if the perceived impairment is, as Gasser concedes, that he cannot be exposed to risk of trauma, then the question is whether his preclusion from exposure to a risk of trauma "disqualified him from a substantial class or broad range of jobs." 240 F.3d at 1115. Dr. Thomas answered a different question - whether preclusion from engaging in heavy physical exertion disqualified Gasser from a substantial class or broad range of jobs. Dr. Thomas's testimony therefore was probative of jobs that require physical exertion, not

just jobs that involve risk of trauma. *Compare Giordano* v. *City of New York*, 274 F.3d 740, 749 (2d Cir. 2001) ("[Plaintiff] introduced evidence that establishes at most that the defendants regarded him as disabled from police or other investigative or security jobs that involve a substantial risk of physical confrontation."). Gasser should have presented evidence of the number of jobs he would be unable to perform because they involve a risk of trauma. It is not sufficient to short-cut this analysis by looking at Gasser's responsibilities in his limited-duty role. There may well be medium- and heavy-duty jobs that do not involve risk of trauma. Dr. Thomas's analysis therefore was not probative - significantly or otherwise - of whether Gasser was precluded from a broad range or a substantial class of jobs, as *Duncan* requires. *See* 240 F.3d at 1115; *Giordano*, 274 F.3d at 749 ("The record contains no evidence from which we can infer that the [police department] thought, or had grounds for thinking, that other jobs in the public or private sector ... carry the same nature or degree of risk."); *Colwell* v. *Suffolk County Police Dep't*, 158 F.3d 635, 644 (2d Cir. 1998) (concluding that police officer's back injury "disqualifies him from only a narrow range of jobs (those involving physical confrontation) and thus his impairment is not a substantially limiting one") (citation and internal quotation marks omitted).[9]

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[9] Gasser also claims that placing him on limited duty violated the Disabilities Act because the District "based its decision entirely on 'myths, fears and stereotypes.'" Corrected Br. of Appellee/Cross-Appellant 33 (quoting 29 C.F.R. pt. 1630, app.). The record does not bear him out. All indications are that the District sought informed, objective, individualized medical

Gasser argues that *Duncan's* evidentiary standard applies only to plaintiffs claiming preclusion from a broad range of jobs. Based on that premise, he urges us to uphold the judgment below despite the flaws in Dr. Thomas's analysis because the District regarded Gasser as unable to perform two classes of jobs: driving jobs and law enforcement jobs. The premise is mistaken. The class-of-jobs limitations he alleges must be "substantial" under the Disabilities Act. 42 U.S.C. § 12102(2)(A), (C). *Duncan's* evidentiary standard applies to all claims of "substantial limitation," whether from a broad range or a substantial class of jobs. 240 F.3d at 1115-16. Gasser therefore failed to satisfy his evidentiary burden.

The district court reached the same conclusion but decided that the "error was more than offset by the fact that [Dr. Thomas] did not omit from his consideration positions involving driving, which [the District] has precluded Plaintiff from doing." *Gasser v. Ramsey,* No. 00-534, mem. op. at 6 n.2 (D.D.C. Nov. 7, 2003). We do not believe this is correct. As discussed above, Gasser presented no evidence of the number of jobs erroneously included in Dr. Thomas's tally of jobs he could not perform - that is, medium- and heavy-duty jobs without a risk of trauma. Nor did Gasser present evidence of the number of jobs "involving driving" the District regards him as unable to perform. In fact, Dr. Thomas testified that when he conducted his analysis he did not know that

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judgments from multiple physicians about the risks to which Gasser was exposed.

the District had restricted Gasser from driving. The district court's ruling that one unquantified number can somehow "offset" another is inconsistent with *Duncan's* requirement that the plaintiff present "some evidence" that is "significantly probative" of the "number and types of jobs" unavailable to the plaintiff. 240 F.3d at 1115. The District claims the limitation was not on driving generally, but on being in a squad car that, in an emergency, could be diverted to a crime scene where Gasser could be exposed to life-threatening trauma. Gasser presented no evidence justifying an inference that the driving limitation was more substantial than this. *Compare Murphy* v. *United Parcel Serv., Inc.*, 527 U.S. 516, 524 (1999) ("At most, petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle - a specific type of vehicle used on a highway in interstate commerce.").

In a case like this, in which the jury-verdict loser was entitled to judgment as a matter of law, we have discretion to "instruct the district court to enter judgment against the jury-verdict winner" or to "return the case to the trial court" for it to assess "whether a new trial, rather than judgment for [the] defendant, should be ordered." *Weisgram* v. *Marley Co.*, 528 U.S. 440, 443-44 (2000). The latter disposition is appropriate if "the district court is better positioned" than we are to decide whether circumstances warrant a new trial. *Id.* Here it is not. Gasser was on "notice, before the close of evidence, of the ... evidentiary deficienc[ies]" repeatedly alleged by the District in its motions for judgment as a matter of law. *Id.* at 454. The expert testimony he

elicited from Dr. Thomas was insufficient. "It is implausible to suggest... that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail." *Id.* at 455. Gasser "had a full and fair opportunity to present [his] case," and "further proceedings are unwarranted." *Id.* at 444.

For the foregoing reasons, the district court's judgment on the verdict entered July 24, 2003, and its post-trial orders awarding reinstatement, lost overtime wages and prejudgment interest, and attorney fees and costs, are reversed. The case is remanded to the district court with instructions to enter judgment for the District of Columbia.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEAL F. GASSER	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No.**
	:	**00-534 (GK)**
DISTRICT OF COLUMBIA	:	
	:	
	:	
Defendant.	:	

[ENTERED: November 7, 2003]

MEMORANDUM OPINION

This matter is before the Court upon Defendant's Motion for Judgment as a Matter of Law [#79] . Upon consideration of the Motion, Plaintiff's Opposition, and Defendant's Reply, the Court concludes that the Motion must be **denied.**

This case is brought under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1201, et seq. Plaintiff, Neal F. Gasser, has been a member of the Metropolitan Police Department ("MPD") for over 17 years. In May, 1994, he was promoted to sergeant and was assigned to supervise police officers with patrol assignments in the business district of the City. During his tenure as a sergeant, Plaintiff was called upon to make an average of three to four arrests per year and at no time faced combat situations or physical altercations.

In July, 1996, Plaintiff was diagnosed with Protein S Deficiency, a disorder affecting the blood's viscosity that if left untreated would make him more susceptible than the average person to developing blood clots. Plaintiff was prescribed the blood thinner Coumadin by his personal physician and was told that, with regular monitoring, he could perform his full duties as sergeant after taking the drug for six months. From January 1997 until December 1998, Plaintiff performed those duties without incident. During this time, Plaintiff informed the Police and Fire Clinic ("PFC") that he was taking Coumadin and was cleared by the PFC for full duty.

In December 1998, Plaintiff visited the Clinic after spraining his wrist in an off-duty car accident, and was told by a PFC doctor that he was being placed on limited duty because of his use of Coumadin. Plaintiff was forced to relinquish his uniform, badge and service weapon. He was restricted to desk duty only and prohibited from riding in a car while on duty. As a result of being placed on limited duty, Plaintiff is not eligible for promotion or the overtime duty which he had been working.

After being placed on limited duty, Plaintiff obtained a written report from his personal physician, Dr. Mirsky, recommending that he be placed back on full duty. Defendant refused. In early 2000, Defendant recommended that Plaintiff be involuntarily retired on disability on the ground that he was not capable of performing any police officer position because of the possibility that he would be

assigned street patrol duty, suffer some physical trauma, and thereby face an excessive risk of bleeding.

Plaintiff argues that he was intentionally discriminated against based on the fact that Defendant regarded him as having a disability, namely the need to use Coumadin, and that Defendant has not proven that Plaintiff poses a direct threat to the health and safety of himself or others in violation of various provisions of the ADA. Defendant, in its Renewed Motion for Judgment as a Matter of Law, argues that Plaintiff has failed, as a matter of law, to prove that the MPD regarded him as having a disability that has a substantial impact on the major life activity of working and that no reasonable jury could have found that Plaintiff did not pose a direct threat to himself or others.

On October 2001, the case was tried before a jury which failed to reach a verdict, and a mistrial was declared. In July 2003, a second trial in this case was held. The jury answered five specific interrogatories and reached a verdict for Plaintiff, awarding him $34,096 for the emotional distress he suffered from Defendant's discrimination.

At the second trial, Defendant moved for judgment as a matter of law at the close of Plaintiff's evidence and at the close of all the evidence. The Court reserved ruling on the first three issues that Defendant raised, and denied the motion as to Defendant's "direct threat" argument. Defendant now raises all the arguments asserted at trial in its

motion for judgment except that relating to an award of back pay and overtime.

This has always been an exceedingly difficult case, and it has not gotten any easier with the passage of time. The first jury struggled conscientiously, but unsuccessfully, to reach a verdict.[10] The second jury was able to reach a verdict, albeit a modest one.

Our system of civil justice has profound respect for the fairness, wisdom and common sense of jurors. Consequently, a new trial may be granted only when "the verdict is against the weight of the evidence, damages are excessive, the trial was not fair, or substantial errors occurred in the admission or rejection of evidence." Luck v. Baltimore & Ohio R.R. Co., 510 F.2d 663, 668 (D.C. Cir. 1975); see also Lewis v. Elliott, 628 F. Supp. 512, 516 (D.D.C. 1986) . Judgment as a matter of law is appropriate in only the narrowest of circumstances--our Court of Appeals has clearly stated that "[w]e will not disturb a jury verdict unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict." Duncan v. WMATA, 240 F.3d 1110, 1113 (D.C. Cir. 2001) (en banc) (internal quotations and citations omitted).

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[10] The Court and counsel talked informally with the jury off the record, after the mistrial was declared. It was clear to the Court that the jurors had fully understood the instructions and had conscientiously examined the evidence. What is more, they grappled with the same issues which have troubled this Court from the beginning of the litigation.

Moreover, the Supreme Court has recently emphasized, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." Reeves v. Sanderson Plumbing, 530 U.S. 133, 150 (2000) (internal quotations and citation omitted) . Thus, in a case such as this one, where the evidentiary issues are so contested, it is particularly important that the appellate standards laid down for consideration of reversal of jury awards be rigorously applied.

In this case, the jury was asked four very narrowly tailored and specific questions. Its answers to those questions were supported by substantial evidence in the record. Plaintiff's opposition to Defendant's Motion spells out, in great detail, all the evidence from which a reasonable jury could reach the conclusions that this jury reached. There is no need to repeat his lengthy factual summaries. It will suffice to draw attention to the following specific evidence.

1. Defendant argues that Plaintiff has failed to meet the requirements of Duncan, 240 F.2d at 1115-16, that he "produce some evidence of the number and types of jobs in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs;. ..." The Duncan court explicitly noted the Supreme Court's citation, with approval, of the relevant EEOC regulations, namely, 29 C.F.R. § 1630.2 (j). Duncan, 240 F.2d at 1115, n.2, citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 480 (1999). In those regulations, the EEOC warns that they "are not

intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few,' 'many,' 'most') from which an individual would be excluded...."

Plaintiff has met that burden. His vocational rehabilitation specialist testified that if he were restricted to only light duty and sedentary work, he would be excluded from 71.4% of the jobs in the Washington Metropolitan area otherwise available to him. There was also testimony that Defendant regarded Plaintiff as substantially limited in both law enforcement jobs and driving jobs. The detail and specificity of the testimony from Plaintiff's expert, as well as other evidence, is certainly as compelling as the testimony presented and found adequate in other ADA cases.[11] See, generally, Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667 (7th Cir. 1998); Burns v. Coca-Cola Enterprises, Inc., 222 F.2d 247 (6th Cir. 2000); Quint v. A.E. Staley Manufacturing Co., 172 F.2d 1 (1st Cir. 1999).

In addition, Plaintiff's expert was subjected to vigorous cross-examination, and Defendant presented no vocational rehabilitation expert from which the jury could draw opposing conclusions.

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[11] While it is true that Plaintiff's expert erred because he inaccurately assumed that Plaintiff would be restricted to light duty or sedentary work, that error was more than offset by the fact that he did not omit from his consideration positions involving driving, which Defendant has precluded Plaintiff from doing.

Consequently, there was ample evidence which the jury could credit, and from which it could reasonably conclude that Plaintiff carried his burden of proving that Defendant regarded Plaintiff as being "significantly restricted in the ability to perform either a class of jobs or broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i).

2. With regard to the issue of whether there was sufficient evidence from which a reasonable jury could find that the Plaintiff did not pose a direct threat to the health or safety of himself or others, the Plaintiff has more than carried his burden of proof.

There was conflicting testimony on this issue. Plaintiff's own treating physician testified that he would medically clear him to work full duty. Moreover, Dr. Mirsky added that so long as the Plaintiff regularly takes his medication, and maintains an INR level between two and three, he is at no greater risk of bleeding than someone not taking Coumadin. The testimony was uncontroverted that Plaintiff was an extremely diligent and compliant patient, and thus would take his Coumadin and submit to careful monitoring of his condition.

In addition, the jury heard about the original California Guidelines on which Defendant relied, which would have restricted Plaintiff from duty, as well as the recently revised California Guidelines, which Defendant chose to ignore, which provide that

people permanently taking Coumadin can now be hired as rookie patrol officers. Finally, there was uncontroverted evidence that Plaintiff performed his duties for two years--without any difficulty whatsoever and with the knowledge and approval of Defendant.

Thus, it is clear that there was more than ample evidence in the record, albeit with opposing evidence to the contrary from the Defendant, from which a reasonable jury could conclude that Plaintiff was not a direct threat to the health or safety of himself or others.

For all the foregoing reasons, the Court concludes that Defendant's Motion for Judgment as a Matter of Law must be **denied.**

November 7, 2003

/s/
Gladys Kessler
United States District Judge

AMERICANS WITH DISABILITIES ACT
(STATUTORY EXCERPT)

DEFINITIONS

SEC. 12102. [Section 3]

As used in this chapter:

(1) Auxiliary aids and services. - The term "auxiliary aids and services" includes-

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. - The term "disability" means, with respect to an individual-

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. - The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

* * * * *

been vested, even if benefits accrued as a result of service with a prior employer had not in fact been vested.

(4) *Rollover contributions.* Amounts attributable to rollover contributions must be excluded. For purposes of §1627.17(e), a rollover contribution (as defined in sections 402(a) (5), 403(a)(4), 408(d) (3) and 409(b) (3) (C) of the Internal Revenue Code) shall be treated as an employee contribution. These amounts have already been excluded as a result of the computations set forth in § 1627.17(e) (2). Accordingly, no separate calculation is necessary to comply with this requirement.

(Sec. 12(c)(1) of the Age Discrimination In Employment Act of 1967, as amended by sec. 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. 98-459, 98 Stat. 1792))

[44 FR 66797, Nov. 21, 1979, as amended at 50 FR 2544, Jan. 17, 1985; 53 FR 5973, Feb. 29, 1988]

PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Sec.

1630.1 Purpose, applicability, and construction.
1630.2 Definitions.

1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."
1630.4 Discrimination prohibited.
1630.5 Limiting, segregating, and classifying.
1630.6 Contractual or other arrangements.
1630.7 Standards, criteria, or methods of administration.
1630.8 Relationship or association with an individual with a disability.
1630.9 Not making reasonable accommodation.
1630.10 Qualification standards, tests, and other selection criteria.
1630.11 Administration of tests.
1630.12 Retaliation and coercion.
1630.13 Prohibited medical examinations and inquiries.
1630.14 Medical examinations and inquiries specifically permitted.
1630.15 Defenses.
1630.16 Specific activities permitted.

APPENDIX TO PART 1630–INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT

AUTHORITY: 42 U.S.C. 12116

SOURCE: 56 FR 35734, July 26, 1991, unless otherwise noted.

§ 1630.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities

Act (42 U.S.C. 12101, *et seq.)* (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 506(e), 508, 510,and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

(b) *Applicability.* This part applies to covered entities as defined at§1630.2(b).

(c) *Construction*—(1) *In general.* Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790-794a), or the regulations issued by Federal agencies pursuant to that title.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

§ 1630.2 Definitions.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) *State* means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) *Employer*—(1) *In general.* The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal

Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(g) *Disability* means, with respect to an individual—

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

(See §1630.3 for exceptions to this definition).

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits*—(1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of *working*—

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of 'working':

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also

disqualified because of the impairment (broad range of jobs in various classes).

(k) *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See §1630.3 for exceptions to this definition).

(n) *Essential functions*—(1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) *Undue hardship*—(1) *In general. Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue

hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) *Qualification standards* means the personal and professional attributes including the

skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired,

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

§ 1630.3 Exceptions to the definitions of "Disability" and 'Qualified Individual with a Disability.'

(a) The terms *disability* and *qualified individual with a disability* do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(1) *Drug* means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C 812)

(2) *Illegal use of drugs* means the use of drugs the possession or distribution of which is unlawful under the Controlled Substances Act, as periodically updated by the Food and Drug Administration. This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(b) However, the terms *disability* and *qualified* individual with a disability may not exclude an individual who:

(1) Has successfully completed a supervised drug rehabilitation program

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Section 1630.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are

not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking.

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an

impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an

impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, i.e., substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) The geographical area to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline copilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs. See Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985); E.E Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be

considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., "few," "many,"

"most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.